NO. 45786-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DOT FOODS, INC.,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

I. INTRODUCTION

Dot maintains in its response that retroactive application of the 2010 amendments to RCW 82.04.423 offends constitutional due process protections. It reaches this result by mischaracterizing the law's history, ignoring one controlling Washington Supreme Court case and misreading another, and relying on a reversed Court of Appeals decision that is both distinguishable and contrary to settled law. Dot also argues on cross-appeal that collateral estoppel exempts it and it alone from the amended RCW 82.04.423, and that application of that statute to Dot violates the separation of powers doctrine.

Dot's arguments all fail for the same reason: they are simply variants on Dot's belief that subjecting it to the amended law is unfair. In this regard Dot is the same as the estates that litigated *Hambleton*:

> The Estates are really arguing this appeal as a matter of fairness. None of their constitutional arguments dictate[s] that they get the relief they seek. The decision to retroactively amend the statute was a policy decision, properly in the sphere of the legislature.

In re Estate of Hambleton, 181 Wn.2d 802, 822 n.3, 335 P.3d 398 (2014). Applying RCW 82.04.423 retroactively is not unfair. But even if it were, Dot's remedy would be with the Legislature. Because Dot cannot prevail here, the Court should reverse the superior court's decision granting summary judgment to Dot and dismiss this case.

II. REPLY BRIEF OF APPELLANT

A. Retroactive Application Of The 2010 Amendment To RCW 82.04.423 Satisfies Due Process Requirements.

Dot makes no mention of the standard of review in its brief, arguing instead about "other taxpayers" and time periods outside of its own narrow refund window. *E.g.*, Dot Foods' Response Brief and Brief on Cross Appeal ("Dot's Brief") at 25. The trial court, however, found that the 2010 amendments to RCW 82.04.423 were unconstitutional "as applied to Dot Foods for the May 2006 through December 2007 periods at issue." CP 496. Thus, to prevail on its due process challenge, Dot must show beyond a reasonable doubt that applying the 2010 amendments to it in this specific context violates due process. *See* Brief of Appellant ("Department's Brief") at 13-14. Dot cannot make this showing.

1. Retroactive tax legislation satisfies due process if it is supported by a legitimate purpose furthered by rational means.

The issues in the Department's appeal have been analyzed in four key cases. These cases demonstrate that retroactive application to Dot of the 2010 amendments to RCW 82.04.423 passes constitutional muster.[1]

[1] Copies of the original version of RCW 82.04.423 and the 2010 amending legislation are attached hereto as Appendices A and B, respectively.

a. *United States v. Carlton* (1994)

Carlton involved a challenge to the retroactive application of an amendment to the federal estate tax statute. *United States v. Carlton*, 512 U.S. 26, 27, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). The original statute provided a tax deduction for estates that sold certain securities to employee stock ownership plans. *Id.*, 512 U.S. at 28; *see* former 26 U.S.C. § 2057 (1986) (later repealed) ("Section 2057"). Carlton, an estate executor, took advantage of a loophole in Section 2057, gaining a $2.5 million tax savings. *Carlton*, 512 U.S. at 28, 31-32. The overall potential tax loss from this loophole was immense. *See id.* at 32.

Congress responded the following year, amending Section 2057 to close the gap that Carlton had discovered. The new language "was made effective as if it had been contained in the statute as originally enacted in October 1986." *Carlton*, 512 U.S. at 29. Because it was retroactive, the 1987 amendment to Section 2057 prevented the estate from claiming the deduction that Carlton's 1986 transactions had allowed. Carlton challenged the retroactive application of the 1987 amendment.

On appeal, the Ninth Circuit held the retroactive tax legislation violated due process, "consider[ing] two factors paramount . . . : whether the taxpayer had actual or constructive notice that the tax statute would be retroactively amended, and whether the taxpayer reasonably relied to his

detriment on pre-amendment law." *Id.* at 29-30 (citing *United States v. Carlton*, 972 F.2d 1051 (9th Cir. 1992)). The Supreme Court, however, rejected the Ninth Circuit's approach because, notwithstanding Carlton's undisputed reliance on the 1986 law, "his reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id.* at 33.

Carlton's lack-of-notice argument also failed, in part because "a taxpayer 'should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation.'" *Id.* at 34 (quoting *Milliken v. United States*, 283 U.S. 15, 23, 51 S. Ct. 324, 75 L. Ed. 809 (1931)). The Court explicitly noted that the Ninth Circuit's exclusive focus on the taxpayer's notice and reliance "held the congressional enactment to an unduly strict standard." 512 U.S. at 35.

Instead of focusing on notice and reliance, the Supreme Court held that the due process standard generally applied to retroactive economic legislation also applies to retroactive tax statutes: the retroactive law must be supported by a legitimate legislative purpose that is furthered by rational means.

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

> To be sure . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects . . . . *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.*

Id. at 30-31 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984)) (emphasis added; internal citation and quotation marks omitted).

Applying this test, *Carlton* held that retroactive application of the amended statute satisfied constitutional due process requirements. First, the law's purpose was "neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created significant and unanticipated revenue loss." *Carlton*, 512 U.S. at 32. Second, there was no improper motive (such as targeting a taxpayer) in the amendment. Third, while Congress could have enacted a general tax increase to make up for the funds lost under the unamended statute, its choice to prevent the loss by denying the deduction to those who had taken advantage of it (or would do so) was not unreasonable. And fourth, "Congress acted promptly and established only a modest period of retroactivity – slightly more than one year." *Id.*

In sum, *Carlton* holds that a tax statute can constitutionally be applied retroactively provided that such application is "rationally related to a legitimate legislative purpose," regardless of what notice a taxpayer

might have had or what reliance the taxpayer might have placed on existing law. *Id.* at 35. Responding to a significant and unanticipated revenue loss is a legitimate legislative purpose, and taxing those whose activities led and would lead to the loss is an entirely rational way to do it.

b. *W.R. Grace Co. v. Department of Revenue* (1999)

Five years after *Carlton*, the Washington Supreme Court decided *W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 973 P.2d 1011 (1999). *W.R. Grace* adopted the *Carlton* test for retroactive application of tax statutes, and upheld a statute with a seven-year retroactive period as applied to W.R. Grace - and a theoretical retroactive period of 37 years.

W.R. Grace arose against a complex legal backdrop. The case involved a challenge to the retroactive application of 1987 amendments to Washington's business and occupation tax on interstate manufacturers and sellers. *Id.* at 584, 600. The original statute had been enacted in 1950, and the Legislature adopted the 1987 amendments in response to the United States Supreme Court's decision in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987). *Tyler Pipe* had held unconstitutional portions of the 1950 law under the Commerce Clause. *W.R. Grace*, 137 Wn.2d at 585-86; *see Tyler Pipe*, 483 U.S. at 236 (describing 1950 B&O tax legislation).

The 1987 amendments cured the problems that *Tyler Pipe* had identified with the 1950 statute. *See American Nat'l Can v. Dep't of Revenue*, 114 Wn.2d 236, 241, 787 P.2d 545, *cert. denied*, 498 U.S. 880, 111 S. Ct. 213, 112 L. Ed. 2d 173 (1990). Based on those amendments, the Department assessed taxes against W.R. Grace for January 1980 through December 1990, a period beginning more than seven years before *Tyler Pipe* had been decided and the amendments became law. *W.R. Grace*, 137 Wn.2d at 587. A portion of the assessment would have been barred by *Tyler Pipe*, but the 1987 amendments to the B&O tax statute, if applied retroactively to W.R. Grace, permitted the full amount. *See id.* at 585-87.

W.R. Grace claimed that "retroactive application of the 1987 curative legislation offends due process because it reaches back too far in time." *Id.* at 600. In support of this claim it pointed to *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (1938) (upholding two-year retroactive application of tax statute); *State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 17, 113 P.2d 542 (1941) (rejecting four-year retroactive application of tax); and *Carlton* (upholding 14-month retroactive application of amendment to estate tax act).

Relying on *Carlton*'s rational basis test and noting its prior decisions holding constitutional the retroactive application of the 1987

legislation, the Court rejected these claims. *W.R. Grace*, 137 Wn.2d at 603; *see American Nat'l Can Corp. v. Dep't of Revenue*, 114 Wn.2d 236, 253, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990) (upholding seven-week retroactive application of tax statute at issue in *W.R. Grace*); *Digital Equipment Corp. v. Dep't of Revenue*, 129 Wn.2d 177, 194-95, 916 P.2d 933 (1996) (upholding retroactive application of same statute for period exceeding 4-1/2 years). The Court observed that prior cases had "not set a specific duration to the retroactive effect of tax legislation." 137 Wn.2d at 603.

While the tax period at issue was more than seven years for *W.R. Grace* itself, the Court did not limit its holding to a particular period. Indeed, the Court stated that retroactive application of the 1987 legislation was "consistent with the legislative intent expressed in § 3 of the 1987 act to apply [it] retroactively, if necessary, *to cure any problems with Washington's B&O tax.*" *Id.* at 601 (citing Laws of 1987, 2d Ex. Sess., ch. 3, § 3) (emphasis added). The Court's reference to "any problems" suggests it might well have found constitutional the retroactive application of the 1987 legislation to *any* period, including one extending back to the B&O tax's enactment 37 years earlier.

In sum, *W.R. Grace* upheld the retroactive application of the 1987 legislative response to *Tyler Pipe* based on the "key inquiry" described in

Carlton: whether retroactive application of the law at issue "is supported by a legitimate legislative purpose furthered by rational means." 137 Wn.2d at 603 (quoting *Carlton*, 512 U.S. at 30-31). The Court imposed no specific time limit on retroactivity, upholding a seven-year retroactive application to the specific taxpayer and suggesting that a 37-year period would have been acceptable under the circumstances.

c. *Tesoro Refining and Marketing Company v. Department of Revenue* (2010, 2012)

In 2010, this Court decided *Tesoro Refining and Marketing Company v. Department of Revenue*, 159 Wn. App. 104, 24 P.3d 211 (2010), *reversed*, 173 Wn.2d 551, 269 P.3d 1013 (2012). *Tesoro* involved taxes paid for the manufacture and sale of bunker fuel from December 1999 through December 2007. *Id.* at 108-10. During this period, former RCW 82.04.433(1) allowed a deduction for the sale of vessel fuel used in interstate commerce. *See* Laws of 1985, ch. 471, § 16. Tesoro filed a refund request based on this deduction, but the Department denied the request because it construed the statute to apply only to wholesaling and retailing B&O taxes. *Tesoro*, 159 Wn. App. at 104, 108-10.

Tesoro appealed the Department's determination, and one day before trial the Legislature amended RCW 82.04.433 to explicitly exclude the manufacturing B&O tax from its scope. *See* Laws of 2009, ch. 491,

§ 2. The amendment thus restated the position the Department had taken under the 1985 law (that Tesoro did not qualify for the refund), but more explicitly. The amendment applied both retroactively and prospectively and so, by its terms, barred Tesoro's refund claim. *Id.* at §§ 2-6; *see Tesoro*, 159 Wn. App. at 107. Tesoro argued that it qualified for the deduction and that retroactive application of the amended law violated due process. 159 Wn. App. at 110, 116.

This Court ruled for Tesoro, holding that former RCW 82.04.433 "unambiguously allowed" Tesoro to take the deduction, and that retroactive application of the 2009 amendments violated due process. *Id.* at 111, 115-16, 120. With respect to due process, the Court described the 2009 amendment to RCW 82.04.433 as having a "24-year retroactivity clause" – i.e., the full period from the statute's original enactment to the effective date of the amendment. *See id.* at 116. This period, the Court reasoned, far exceeded the 14-month period upheld in *Carlton*, and was also contrary to "the reasonable expectations" of the taxpayer. The Court further emphasized that the 2009 legislation was plainly intended to prevent Tesoro from obtaining the refund it sought. Effective one day before trial, the amendment "evidence[d] the type of improper taxpayer targeting identified by the *Carlton* Court." *Id.* at 119.

Tesoro made no mention of *W.R. Grace*, despite the fact that it was an on-point Washington Supreme Court case decided 11 years earlier. The opinion also misunderstands *Carlton*, reading that case as having established the "notice-and-reliance" factors as "paramount . . . in determining whether retroactive application of a tax violates due process." *Id.* at 118. The "paramount factors" *Carlton* described, however, were those upon which the Ninth Circuit had relied. *Carlton*, 512 U.S. at 29-30. The Supreme Court in *Carlton* explicitly *rejected* this standard and instead reaffirmed that retroactive tax legislation is constitutional if it is rationally related to legitimate legislative purposes. *Carlton*, 512 U.S. at 30-31, 33-35. For this reason and others discussed below, *Tesoro* is not controlling or persuasive authority in this case.

The Supreme Court reversed *Tesoro* without reaching the retroactivity issue. Instead, the Court held that Tesoro was not entitled to the deduction it sought even under the 1985 version of RCW 82.04.433. Because Tesoro could not receive a refund under the original statute, whether the 2009 amendments to that law applied retroactively was a moot question. *Tesoro v. Dep't of Revenue*, 173 Wn.2d 551, 557, 559 & n.3, 269 P.3d 1013 (2012).

d. *Estate of Hambleton v. Department of Revenue* (2014)

Washington's most recent case on the retroactive application of tax legislation is *In re Estate of Hambleton v. Department of Revenue*, 181 Wn.2d 802, 335 P.3d 398 (2014). *See* Department's Brief at 14-21 (discussing *Hambleton*). The case addressed whether a retroactive amendment to the definition of a taxable "transfer" in the 2005 Estate and Transfer Tax Act, RCW 83.100, complied with due process. The Legislature had passed the amendment in response to the Supreme Court's decision in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012), in which the Court had adopted a narrow interpretation of "transfer." *Bracken* exempted from taxation many trusts created by people who died prior to the effective date of the 2005 Act, *i.e.*, May 17, 2005. *See* Laws of 2005, ch. 516, § 22.

Bracken presented a major blow to the state's budget, with an estimated loss of more than $118 million in 2014 alone. *Hambleton*, 181 Wn.2d at 826-27 (quoting Fiscal Note to Engrossed H.B. 2075, 63rd Leg., 2d Spec. Sess. (Wash. 2013) at 3). The Legislature responded immediately, amending the definition of "transfer" to ensure that the term applied broadly. *See* Laws of 2013, 2d Spec. Sess., ch. 2.

The 2013 amendment applied prospectively and retroactively "to all estates of decedents dying on or after May 17, 2005," with the exception of "any final judgment, no longer subject to appeal, entered by a

court of competent jurisdiction before the effective date of this section . . . ." *Id.* at §§ 9, 10. The Legislature explained that the amendment was necessary to "reinstate the legislature's intended meaning when it enacted the estate tax," and to avoid the substantial financial impact of the *Bracken* decision by "reaffirming its intent" that the term "transfer" should be given the broadest possible meaning. *Id.* at § 2.

In *Hambleton*, two estates challenged the amendment, claiming that retroactive application of the definition for "transfer" violated due process. *Hambleton*, 181 Wn.2d at 809, 823. Relying on the same standard used in *Carlton* and *W.R. Grace* to address due process claims against retroactive statutes, the Supreme Court rejected the estates' argument. *Hambleton*, 181 Wn.2d at 823-24 (citing *W.R. Grace & Co.*, 137 Wn.2d at 602-03). Absent from *Hambleton* is any mention of *Tesoro*.

Just as in *Carlton* and *W.R. Grace*, the Court in *Hambleton* explained that retroactive application of a statute does not violate due process provided that it is (a) supported by a legitimate legislative purpose, and (b) furthered by rational means. *Hambleton*, 181 Wn.2d at 823-24. Addressing a significant and unanticipated revenue loss is a legitimate legislative purpose. *Id.* at 825 (citing *Carlton*, 512 U.S. at 32). And the rational means standard is satisfied as long as "[t]he period of retroactivity is rationally related to preventing the fiscal shortfall." *Id.* at

827. The Court noted that there was no set rule for determining the permissible length of a law's retroactivity, but observed that it had upheld legislation with a "retroactive period spanning more than seven years." *Id.* at 825 (citing *W.R. Grace*, 137 Wn.2d at 586-87). The Court also rejected the Estates' suggestion that *Carlton* creates a "threshold" on the period of retroactivity. *Hambleton*, 181 Wn.2d at 826 n.4.

Applying the rational basis test to the 2013 estate tax amendments, the *Hambleton* Court unanimously concluded that retroactive application of the amendments was constitutional. "Like the legitimate purpose in *Carlton*, the purpose of the 2013 amendments is largely economic." *Id.* at 826-27. In addition, the period of retroactivity was rationally related to the fiscal shortfall and was "directly linked with the purpose of the amendment, which is to remedy the effects of *Bracken*." *Id.* at 827. The Court also emphasized that "the eight-year period of retroactivity is not far outside other retroactive periods that courts have accepted." *Id.* at 827.

2. Retroactive application of the 2010 amendments to RCW 82.04.423 is consistent with *Carlton*, *W.R. Grace*, and *Hambleton*.

Dot makes two primary arguments in favor of its position on retroactivity. First, it maintains that *Hambleton* is distinguishable, irrelevant, and wrong. Second, it argues that the actual "controlling authority" is the reversed *Tesoro* decision. Both arguments fail.

As explained in the Department's opening brief, *Hambleton* dictates the outcome of this case.[2] But it is not *Hambleton* alone that shows the trial court erred – it is the entire line of cases that govern retroactivity in Washington. The first of these is *Carlton*, which establishes the test for retroactive application of tax legislation. Such application satisfies due process provided that it is "rationally related to a legitimate legislative purpose." *Carlton*, 512 U.S. at 35. Responding to a significant and unanticipated revenue loss is a legitimate legislative purpose, and the enactment of legislation that retroactively taxes the group responsible for that loss is a rational response. *Id.* at 36.

When it amended RCW 82.04.423 in response to *Dot Foods v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009) (*Dot Foods I*), the Legislature acted precisely as *Carlton* permits: it responded to a significant and unanticipated loss of revenue by enacting a statute to re-capture that revenue. Like the statute in *Carlton*, the 2010 amendments to RCW 82.04.423 apply both retroactively and prospectively, and affect those taxpayers associated with the revenue loss. The United States

[2] Dot used to agree with this, telling the Supreme Court in January 2014 that it had "a strong interest in the Court's resolution of *Hambleton*" because this case and *Hambleton* involve the same due process issue. Department of Revenue's Mot. to Stay Proceedings, Exh. 4 at 1-3. Dot also argued that it was "[l]ike the taxpayers" in *Hambleton* and that the amendment Dot contests in the present case was "remarkably similar" to the legislation in *Hambleton*. *Id.*

Supreme Court upheld retroactive application of the 1987 federal legislation, and its reasoning applies here with equal force.

W.R. Grace is even more on point. That case followed in the wake of *Tyler Pipe*, which had held a large part of Washington's B&O tax system unconstitutional. The tax at issue had been enacted in 1950, and *Tyler Pipe* held it unconstitutional in 1987. The Legislature responded immediately to the decision, with the amended law taking effect in August 1987, seven weeks after *Tyler Pipe*. *W.R. Grace*, 137 Wn.2d at 585-86.

The assessment that W.R. Grace appealed covered January 1980 through December 1990 – a span beginning nearly eight years before the 1987 amendment. Among other arguments, W.R. Grace claimed that the amendment "reache[d] back too far in time" when applied to it. Our Supreme Court rejected this claim, relying on *Carlton*, other United States Supreme Court decisions, and its own decisions on the retroactivity of the same law at issue in *W.R. Grace*. *W.R. Grace*, 137 Wn.2d at 600-03.

Dot's appeal is indistinguishable from *W.R. Grace*. In both cases the Legislature amended a statute in response to a significant and unexpected fiscal loss caused by a court decision. In response to the unexpected fiscal loss that *Tyler Pipe* created, the Legislature amended the B&O tax statute. In response to the unanticipated fiscal loss that *Dot Foods I* created, the Legislature amended RCW 82.04.423.

Furthermore, the tax period in this case begins four years before the amendment to RCW 82.04.423, while *W.R. Grace* involved nearly an *eight*-year span – a span that the Supreme Court upheld. Given that *W.R. Grace* involved a retroactive period nearly twice as long as the one Dot disputes, it cannot plausibly be argued that the 2010 amendment to RCW 82.04.423 "reaches back too far in time."

Focusing on the law's original enactment (and ignoring that it is raising an as-applied and not a facial challenge), Dot argues that the amendment it disputes actually has a 27-year retroactive period. *E.g.* Dot's Brief at 23-25.[3] If Dot's counting method were correct, then *W.R. Grace* must be seen as having upheld a *37-year* period of retroactivity – from 1950 to 1987 – again defeating Dot's argument. However, one measures the retroactive period, *W.R. Grace* controls Dot's appeal.

In sum, if *W.R. Grace* is the law in Washington – which, of course, it is – then Dot cannot prevail. Rather than respond to the case on its merits, however, Dot relegates *W.R. Grace* to a footnote, misstating the

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[3] Dot attempts to recast this case from an as-applied to a facial challenge, without actually using the words "as-applied" or "facial." *See* Dot's Brief at 24-25. Dot cites no authority for this argument and it does not provide any analysis of either type of challenge. In any event, Dot could no more prevail under a facial challenge than it could under the as-applied standard. Facial challenges are "disfavored" and "must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." *State v. McCuistion*, 174 Wn.2d 369, 389, 275 P.3d 1092 (2012) (emphasis in *McCuistion*; citations and internal quotation marks omitted). There are many "sets of circumstances" in which the 2010 amendments to RCW 82.04.423 can be constitutionally applied, the most obvious being Dot's own case.

Supreme Court's reasoning and ignoring its holding. *See* Dot's Brief at 23 n.5. Dot misrepresents the holding in *W.R. Grace* by claiming that the case "does not justify retroactivity by applying *Carlton*, but instead by viewing retroactivity as a remedy for unconstitutional taxes." *Id.* But Dot ignores the case's multiple citations to *Carlton*, and its explicit references to *Carlton*'s rational basis test for retroactive tax legislation. *See W.R. Grace*, 137 Wn.2d at 601-03.

Arguing that *W.R. Grace* is limited to legislative responses to statutes held unconstitutional also ignores the fact that *Hambleton* relies heavily on *W.R. Grace*. *Bracken* did not hold any law unconstitutional, meaning that *Hambleton* was not a response to a constitutional holding. *See Hambleton*, 181 Wn.2d at 813. The distinction Dot attempts to draw between *W.R. Grace* and other retroactivity cases does not exist.

Like *Hambleton*, *W.R. Grace* shows that the trial court wrongly decided this case. *Hambleton* recognizes that *W.R. Grace* and *Carlton* establish the test for retroactivity of tax legislation in Washington. The 2010 amendments to the direct seller's exemption were remedial measures "called for by the statute" and easily pass that test. *Cf. W.R. Grace*, 137 Wn.2d at 603. And while the trial court's letter opinion could not have addressed *Hambleton* (which was decided after its ruling), its failure even to mention *W.R. Grace* is inexplicable. Regardless, *W.R. Grace* requires

the trial court's decision to be reversed. Applying the 2010 amendments to Dot is as constitutional as applying the 1987 amendments to the B&O tax to *W.R. Grace* and the other plaintiffs in that case.

Hambleton leads to the same result in this case that *W.R. Grace* and *Carlton* do. Even Dot acknowledges that *Hambleton* upheld the eight-year retroactive application of an amendment to the estate tax statute. Dot's Brief at 23. Because this, too, is longer than Dot's as-applied claim, the analysis should end here. *See* Department's Brief at 18-25. The distinctions Dot attempts to draw between *Hambleton* and this case, *see* Dot's Brief at 23-30 ("contrasting" retroactive periods, reasons for retroactive application. revenue amounts, and taxpayer reliance), are without a difference, because the test for retroactivity is simply whether the legislation is rationally related to a legitimate purpose.

Responding to a judicial decision that would lead to a significant loss is a legitimate purpose, and amending a statutory exemption as the Legislature did in *Hambleton* and here is a rational way to address it. The fact that *Hambleton* also addressed disparate treatment for married and unmarried people, while the amendment to RCW 82.04.423 also addresses concerns over out-of-state businesses, is not material. Both cases involve unexpected losses, and in both cases the Legislature expressed additional reasons to change the law. *Hambleton* is legally indistinguishable.

3. *Tesoro* does not compel a different result.

The case upon which Dot places the most reliance is the reversed Court of Appeals decision in *Tesoro*. This is the only Washington case since *Carlton* in which a Court has rejected retroactive application of a tax statute. According to Dot, that case, not *Carlton*, not *W.R. Grace*, and not *Hambleton*, governs the outcome of Dot's challenge to the amendments to RCW 82.04.423. For at least four independent reasons, Dot is wrong.

Tesoro conflicts with *Carlton.* According to *Tesoro*, *Carlton* stands for the proposition that the "two factors paramount" in assessing the validity of a retroactive tax amendment are (a) the "taxpayer's notice" of a change in the law, and (b) the taxpayer's reliance on pre-amendment law. *Tesoro*, 159 Wn. App. at 104. In fact, this is the formulation that *Carlton* expressly *rejected. See Carlton*, 512 U.S. at 29-31, 35. The Court misread *Carlton* in *Tesoro*, and the mistake undermines the opinion, just as it undermines Dot's reliance on that case.

Tesoro conflicts with *W.R. Grace*. In *W.R. Grace*, the 1987 Legislature retroactively amended a statute enacted in 1950. The Court concluded that the amendment's application to the seven-year tax period at issue complied with due process. Thus, *W.R. Grace* only considered the tax period at issue when evaluating the due process claim. It did not rule that the relevant period began when the Legislature enacted the law that

was later amended. That date would have been a full 37 years before the enactment of the retroactive amendment.

Tesoro ignores this, treating the amendment there as having a 24-year-period of retroactivity. That period was measured from the original statute's effective date, as opposed to the beginning of the tax period presented to the Court, which would have given a retroactive period of ten years. Measuring the retroactive period in this manner is directly contrary to the Supreme Court's due process analysis in *W.R. Grace*. Thus, *Tesoro* wrongly looked at the law before it as involving a quarter-century period of retroactivity instead of only ten years, and disregarded Supreme Court law that would have upheld the amendment.[4]

For the same reason, Dot is wrong when it persists in calling the 2010 direct seller's exemption amendment one with a 27-year-period of retroactivity. Dot seeks a refund of taxes paid in 2006-2007, and the trial court's decision was that the law was unconstitutional *as applied to Dot for that period only*. The retroactivity period here is four years, not 27.

This case is distinguishable from *Tesoro* in a critical regard. In *Tesoro*, this Court concluded that the Legislature had "targeted" Tesoro when it amended RCW 82.04.433. The legislative history of the statute

[4] *Tesoro*'s focus on the 24-year period between enactment and amendment is contrary to *W.R. Grace* in another way, as *W.R. Grace* upheld an amendment enacted 37 years after the original statute.

referred explicitly to Tesoro's then-pending refund claim, and it took effect the day before the *Tesoro* trial began. This history, the Court concluded, "evidences the type of improper taxpayer targeting identified by the *Carlton* Court." 159 Wn. App. at 119; *see also id.* at 118 ("the legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro's refund request").

There is no targeting here. Unlike in *Tesoro*, there is nothing in the legislative history of the 2010 amendment – other than its preservation of final judgments – that refers to Dot. To the contrary: the losses described in the fiscal note far exceed the amount that Dot now seeks as a refund, and the fact that *Dot Foods I* gave out-of-state businesses an advantage over in-state ones is a general concern that applies to every Washington taxpayer. Also unlike *Tesoro*, the Legislature here did not amend the law on the eve of a trial in which the taxpayer sought a refund.[5]

In this context Dot also wrongly analyzes the Legislature's discussion of out-of-state businesses, arguing that "in 2010, a business could not restructure its operations to avail itself of the Court's decision in *Dot Foods I* for any prior years." Dot's Brief at 27. What Dot ignores is that other businesses *like Dot* had sold products in Washington before *Dot*

[5] Dot concedes that this case is not *Tesoro* when it contrasts the Department's actions here to *Tesoro*, "where the Department informed the Legislature of Tesoro's refund suit and the Legislature amended the statute on the eve of Tesoro's trial." Dot's Brief at 30.

Foods I and could apply for refunds – just as Dot had – for periods before the 2010 amendment to the direct seller's exemption. Absent retroactive application of the statute, the State would have been required – just as it had with Dot – to grant the refunds.

Dot presents no evidence that it was targeted, because there is none. In *Tesoro*, this Court concluded that the Legislature had singled out a taxpayer in order to prevent a pending refund claim. However, it is certain that Dot was not targeted by the 2010 amendment. Instead, Dot was simply *affected* by that law the same way any similar taxpayer was, except that Dot's Supreme Court decision was preserved.

Tesoro was reversed on appeal, albeit on other grounds. Despite Dot's complaints, it is hardly "frivolous" to mention *Tesoro*'s reversal, nor is it frivolous to cite an appellate case discussing the precedential value of decisions reversed on other grounds. *See* Dot's Brief at 12 n.2. Although some cases cite decisions reversed on other grounds, the point remains: *Tesoro* is a reversed Court of Appeals case that conflicts with at least two precedential Washington State Supreme Court decisions and more than one United States Supreme Court decision.[6] Dot's appeal should be

[6] *Tesoro* has been cited only once by an appellate court, in a decision issued before the Supreme Court reversed it. *See North Central Wash. Respiratory Svcs., Inc. v. Dep't of Revenue*, 165 Wn. App. 616, 634, 268 P.3d 972 (2011).

resolved under the law established by the United States Supreme Court, and adopted and endorsed by the Washington Supreme Court.

B. Dot Is Not The Washington State Legislature.

Dot implies that the Legislature somehow deceived the public when it amended RCW 82.04.423 in 2010. Specifically, Dot argues that the Legislative findings regarding the financial impact of *Dot Foods I* were inflated, that the losses the Legislature described were not unexpected, and that the Legislature was simply fabricating when it stated that it was restating the original intent of the statute. According to Dot, despite what the Legislature found, the amendment "had neither a wholly legitimate purpose nor was the means for effectuating those purposes rational." Dot's Brief at 11-12.

The Legislature was explicit about its intentions in enacting the 2010 amendment to the direct seller's exemption:

> (1) A business and occupation tax exemption is provided . . . for certain out-of-state sellers that sell consumer products exclusively to or through a direct seller's representative. The intent of the legislature in enacting this exemption was to provide a narrow exemption for out-of-state businesses engaged in direct sales of consumer products . . . .
>
> (2) In *Dot Foods [I]* . . . , the Washington supreme court held that the exemption in RCW 82.04.423 applied to a taxpayer: (a) That sold nonconsumer products through its representative in addition to consumer products; and (b) whose consumer products were ultimately sold at retail in permanent retail establishments.

> (3) The legislature finds that most out-of-state businesses selling consumer products in this state will either be eligible for the exemption under RCW 82.04.423 or could easily restructure their business operations to qualify for the exemption. As a result, the legislature expects that the broadened interpretation of the direct sellers' exemption will lead to large and devastating revenue losses. . . . . Moreover, the legislature further finds that RCW 82.04.423 provides preferential tax treatment for out-of-state businesses over their in-state competitors and now creates a strong incentive for in-state businesses to move . . . outside Washington.
>
> (4) Therefore, the legislature finds that it is necessary to reaffirm the legislature's intent in establishing the direct sellers' exemption and prevent the loss of revenues resulting from the expanded interpretation of the exemption by amending RCW 82.04.423 retroactively to conform the exemption to the original intent of the legislature . . . .

Laws of 2010, 1st Spec. Sess., ch. 23, § 401.

These findings amply support retroactive application under *Carlton*, *W.R. Grace*, and *Hambleton*. With respect to the amendment's legitimate purposes, they show a significant and unexpected revenue loss and concern over giving an unfair advantage to out-of-state businesses. *Cf. Hambleton*, 181 Wn.2d at 825. As to whether the amendment was rationally related to that purpose, the period here at issue – four years as applied to Dot Foods – is entirely rational. *See id.* at 826-27; *W.R. Grace*, 137 Wn.2d at 602-04. As to the substance of the direct seller's exemption, there is certainly nothing irrational about the means the Legislature chose to correct it: the Legislature found that the Supreme Court's "broadened interpretation" of the direct seller's exemption in *Dot Foods I* would lead

to a significant and unanticipated revenue loss, and would provide an advantage to out-of-state businesses. Therefore, the Legislature added language to narrow the exemption. *See* Laws of 2010, 1st Spec. Sess., ch. 23, § 401.

Faced with these facts, Dot challenges the Legislature itself. It takes issue, for example, with the "large and devastating" revenue loss that the Legislature found. According to Dot, that language was predicated on a fiscal note that included future losses, and the "refund impact" was "less than $60 million." Dot's Brief at 28. There is no trickery in the Legislature's numbers; these are simply the figures that were in the fiscal note. Dot presents no evidence to suggest that the Legislature meant something other than what it said.

Dot whittles the Legislature's figures ($150 million for 2009-2011 and $191 million for 2011-2013, CP 80) to an artificially deflated amount and then argues that $60 million is not "enough" to justify retroactive application of the 2010 amendments. *See* Dot's Brief at 28.[7] *Carlton* and *Hambleton* do state that the revenue loss should be "significant" to justify

[7] Dot mentions in this context that if its case is an "as applied" challenge (which it is), then the Court should use Dot's refund claim of $500,000 to evaluate the revenue loss. Dot's Brief at 29 n.7. This is nonsense, and no court ever has taken such an approach. The revenue loss from *Dot Foods I* is not based only on Dot Foods, however Dot couches its challenge to the efforts to prevent that loss. In addition, other taxpayers could make the same claim in their individual lawsuits, resulting in death of the retroactive amendment by a thousand cuts.

retroactive application of an amendment, and both include prospective losses in the "significant" figures they present. *See Carlton*, 512 U.S. at 31-32; *Hambleton*, 181 Wn.2d at 826-27. Doing so in this case raises the loss from the $60 million that Dot advances to hundreds of millions of dollars. By any measure this is a "significant" amount of money, and Dot's figure of $60 million is not trivial. In any event, it is not for Dot Foods, an Illinois corporation, to second-guess the Legislature in determining how much money is "significant" to Washington's economy.

Dot also complains that the 2010 Legislature could not conceivably have known the intent of the 1983 body that originally enacted RCW 82.04.423. Dot's Brief at 19-20. In the same vein, Dot argues that "*Carlton* shows that a claim of 'unintended consequences' will support a retroactive change or clarification only when the difference between legislative goals and actual results is readily apparent to roughly the same body of legislators that enacted the original statute." Dot's Brief at 18. *Carlton* says nothing like this, and what Dot might mean by "roughly the same body" is unknowable. In any event, presumably the 1987 Legislature that amended the B&O tax at issue in *W.R. Grace* was no more "roughly the same body" as the 1950 Legislature that enacted it, than the 2010 body that amended the statute at issue here was "roughly the same body" as the 1983 Legislature that enacted it.

Ultimately it matters not what a legislature knows about the intent of an earlier legislature. There is no requirement in *Carlton*, *W.R. Grace*, or *Hambleton* that an amending legislature know the intent of the enacting legislature. Instead, these controlling cases simply require that retroactive legislation be rationally related to a legitimate purpose. Put differently, the Legislature could enact a brand new statute and make it retroactive, and the due process test would be the same.

Although the Legislature made no explicit finding, Dot also attacks the implied finding that the revenue loss was "unanticipated." According to Dot, neither the Department nor the Legislature could possibly have been surprised by the Supreme Court's holding in *Dot Foods I* because the Department had administered the direct seller's exemption in Dot's favor when the law was first enacted. Dot's Brief at 29.

Absent from Dot's discussion is any mention of the decade during which the Department construed the statute to exclude Dot, and the decisions that upheld that interpretation. The Department did interpret the original RCW 82.04.423 to exempt Dot until late 1999. Effective January 2000, however, the Department revised its interpretation and notified taxpayers of this fact. Dot rejected the Department's action and continued to claim the exemption, while the Department continued to apply its 2000 interpretation. The Department eventually audited Dot and issued an

assessment for unpaid taxes. *Dot Foods I*, 166 Wn.2d at 917. Dot paid the assessed taxes and brought a refund action.

The trial court *upheld* the Department's interpretation, and in 2007 this Court reached the same result – that the Department's assessment was correct. *See Dot Foods, Inc. v. Dep't of Revenue*, 141 Wn. App. 874, 173 P.3d 309 (2007), *reversed*, 166 Wn.2d 912, 215 P.3d 185 (2009). It was not until September of 2009 – nearly ten years after the Department corrected its interpretation of the direct seller's exemption – that the Supreme Court held the statute meant something else. Thus, for nearly a decade, the Department consistently interpreted the statute to exclude Dot, and courts upheld that interpretation. Seen in this context, it is plain why the 5-4 decision in *Dot Foods I* was a surprise to the Legislature and why the revenue loss it threatened to cause was unanticipated.[8]

Dot's suspicions about the Legislature's motivations do not warrant tossing aside the legislative findings in the 2010 amendments to RCW 82.04.423. Indeed, Dot could not do so if it wanted, as the court "cannot dispute this legislative finding." *Frach v. Schoettler*, 46 Wn.2d 281, 285, 280 P.2d 1038 (1955). The simplest explanation for why the Legislature did what it did is the correct one: When *Dot Foods I* was

[8] This is also why Dot cannot prevail under *Tesoro*'s "notice and reliance" standard. For more than nine years the Department and the courts had told Dot that its interpretation of former RCW 82.04.423 was incorrect. To the extent that Dot continued to rely on that construction, it was unreasonable.

decided, it created an unexpected and substantial loss of revenue. The Legislature responded in a rational way by amending the law upon which *Dot Foods I* was based. As applied to Dot Foods, this amendment easily passes constitutional muster.

C. Dot's Reliance On New York Case Law Is Misplaced.

Dot repeatedly cites a New York case that it claims supports its position on retroactivity. *James Square Assocs., LP v. Mullen*, 21 N.Y.3d 233, 994 N.E.2d 374, 970 N.Y.S.2d 888 (2013); *see* Dot's Brief at 27-29, 31. This case is of no use to the Court: Washington law on the retroactive application of tax statutes is well developed, so there is no need to turn to the law from another state for guidance. Dot's challenge is governed by a United States Supreme Court decision (*Carlton*) and two Washington State Supreme Court decisions (*W.R. Grace* and *Hambleton*).

As it happens, New York uses a different test when analyzing retroactivity of a tax law. Rather than the two-part rational basis test that *Carlton* establishes, New York uses a *three*-part test:

> The important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law,' (2) 'the length of the retroactive period,' and (3) 'the public purpose for retroactive application.'

James Square at 246 (quoting *Replan Dev. v. Dep't of Hous. Preserv. & Dev. of City of New York*, 70 N.Y.2d 451, 456, 517 N.E.2d 200, 522

N.Y.S.2d 485 (1987)). New York's due process standard is nearly indistinguishable from the test that the Supreme Court rejected in *Carlton*. There, the Court reversed the Ninth Circuit's determination that the "paramount factors" in the due process analysis were a taxpayer's notice and reliance in relation to the amended statute. *Carlton*, 512 U.S. at 29-31, 35. Consistent with *Carlton*, neither *W.R. Grace* nor *Hambleton* adopt or purport to apply a due process test based on a taxpayer's forewarning of a change in the statute or its reliance on the former law.

D. This Court Is Bound To Follow *Hambleton* Regardless Of Whether Dot Disagrees With It.

Dot also argues that it is entitled to relief because *Hambleton* was wrongly decided and "should be overruled or narrowed." Dot's Brief at 33. The Department will not re-argue *Hambleton* here – and does not need to. As Dot recognizes, unless *Hambleton* is reversed or overruled, this Court must follow it. *See, e.g., 1000 Virginia LP v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("A decision by this court is binding on all lower courts in the state. . . . When the Court of Appeals fails to follow directly controlling authority by this court, it errs").

In the unlikely event that the United States Supreme Court grants *Hambleton*'s petition for certiorari and in the even more unlikely event that it reverses *Hambleton*, Dot will still have to contend with *W.R. Grace*.

That case supports the Department's position as much as *Hambleton* does. Thus, even without *Hambleton*, this Court should uphold retroactive application of the Legislature's 2010 amendments to RCW 82.04.423.

III. RESPONSE BRIEF OF CROSS-RESPONDENT

On cross appeal, Dot asserts two additional reasons why it believes that it is entitled to a refund for the May 2006 through December 2007 tax period. Dot's Brief at 1. First, Dot claims that the 2010 amendments create a special exemption only for Dot by "preserving" the "collateral estoppel effect" of the *Dot Foods I* decision for future tax periods. Dot's Brief at 35-36. Second, Dot argues that if the 2010 amendments do not require *Dot Foods I* to apply to Dot's current refund action, then the amendments violate separation of powers. Dot's Brief at 45-48. Both of Dot's arguments fail for the same reason: Nothing in the language of the 2010 amendments or *Dot Foods I* require this Court to ignore the fact that the Legislature retroactively changed the law. Thus, contrary to Dot's claims, applying the 2010 amendments to Dot in this case is not barred by collateral estoppel and does not violate the separation of powers doctrine.

A. Counter-Statement Of Issues

1. Did the Legislature preserve Dot's final judgment while also subjecting Dot to the 2010 amendments for tax periods not previously litigated?

2. Did the Legislature comply with the separation of powers doctrine when it retroactively amended RCW 82.04.423 without affecting any final judgments entered prior to the amendment?

B. Argument

1. Collateral estoppel and the 2010 amendments' preservation of final judgments do not prevent the Department from litigating Dot's current case.

Dot asserts that collateral estoppel bars the Department from disputing Dot's current refund claim because the Supreme Court concluded that Dot qualified for the former direct seller's exemption in *Dot Foods I.* Dot's Brief at 37-38. Dot further asserts that the Legislature's retroactive amendment to the direct seller's exemption does not change this result because language in the amendment "preserved" the "collateral estoppel effects" of the *Dot Foods I* decision. *Id.* at 39-45. To support these assertions, Dot interprets the 2010 amendment as creating a special exception unique to Dot and expands *Dot Foods I* to apply beyond the tax period at issue in the decision. Because Dot's arguments rewrite the history of this litigation while ignoring applicable law, this Court should reject them.

a. Collateral estoppel does not apply to this case.

Collateral estoppel "precludes relitigation of the same issue in a subsequent action between the same parties." *Regan v. McLachlan*, 163

Wn. App. 171, 181, 257 P.3d 1122 (2011). A party must meet specific requirements for the doctrine to apply. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004). In particular, for collateral estoppel to apply here, Dot must establish each of the following four elements:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Id. at 307. Dot bears the burden of proving these factors, and "[f]ailure to establish any one element is fatal to the proponent's claim." *Lopez-Vasquez v. Dep't of Labor & Indus.*, 168 Wn. App. 341, 345, 276 P.3d 354 (2012). Because Dot cannot satisfy the first and fourth elements of the test, its collateral estoppel claim fails.

The first element requires that the issue resolved in a previous proceeding be identical to the issue in the later proceeding. *Id.* For the issues to be identical, the law in the two proceedings must be the same. *See, e.g., Hambleton*, 181 Wn.2d at 834-35 (collateral estoppel did not prevent the retroactive application of an amended law when the Court had interpreted the prior version of the law in the taxpayer's favor); *San Telmo Associates v. City of Seattle*, 108 Wn.2d 20, 22-23, 735 P.2d 673 (1987)

(refusing to apply collateral estoppel to subsequent proceeding involving same parties when the ordinance at issue had changed); *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) (collateral estoppel applies only if the matter in the second suit is identical to that in the first and "the controlling facts and applicable legal rules remain unchanged").

Here, there can be no question that Dot fails to meet this first element because no court has previously decided the issue in this case: whether Dot qualifies for the direct seller's exemption under the 2010 amendments to RCW 82.04.423 for the May 2006 to December 2007 tax period. CP 12-16. While Dot insists that the Supreme Court already determined its eligibility for the direct seller's exemption in *Dot Foods I*, Dot ignores the fact that the Legislature amended the exemption after the Supreme Court decided *Dot Foods I*, making a change in the law. Laws of 2010, 1st Spec. Sess., ch. 23, § 402. After *Dot Foods I*, the Legislature narrowed the direct seller's exemption to impose stricter requirements for a business to qualify. *Id.* The Legislature declared that this narrowed version of the exemption would apply retroactively. *Id.* at § 401. Thus, because the Legislature changed the law, the issue in *Dot Foods I* is not identical to the issue before the Court in this case.

Dot also cannot meet the fourth element of the collateral estoppel test, that the application of collateral estoppel must not result in an

injustice. *See Christensen,* 152 Wn.2d at 307. Applying collateral estoppel causes an injustice when it deprives a party of a "fair and full hearing on the issue in question." *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 791, 982 P.2d 601 (1999) (internal quotation marks omitted). While Dot suggests that the Department had such a hearing during the *Dot Foods I* litigation, Dot again ignores the fact that the Legislature changed the law in response to the Supreme Court's decision in that case. Laws of 2010, 1st Spec. Sess., ch. 23, §§ 401-02. Thus, the Department has not had the opportunity to litigate Dot's eligibility for the direct seller's exemption under the 2010 amendment. In fact, depriving the Department of this opportunity would be especially unfair when Dot does not even claim that it qualified under the 2010 amendment for the exemption during the tax period at issue here. *See* CP 12-16. Accordingly, applying collateral estoppel to Dot's current refund action would allow Dot to receive the benefit of an exemption for which it does not qualify.

Applying collateral estoppel also would cause an injustice to the Legislature. When amending RCW 82.04.423, the Legislature expressly stated its intention to narrow the direct seller's exemption retroactively. Laws of 2010, 1st Spec. Sess., ch. 23, §§ 401-02. If this Court were to apply collateral estoppel to this case as Dot advocates, it would be thwarting the Legislature's intent. Rather than following the current law

as enacted by the Legislature, the Court would be applying a Supreme Court decision interpreting an outdated version of the direct seller's exemption. Such a result would put this Court at odds with the Legislature's role of creating policy and passing laws. *See Hambleton*, 181 Wn.2d at 818 (recognizing that role of Legislature is to make policy, and enact laws). Because applying collateral estoppel would cause multiple injustices, the doctrine cannot apply to this case.

b. The 2010 amendment does not create a special exemption from its retroactive effect for Dot.

Dot also argues that the Legislature specifically preserved the "collateral estoppel effect" of the *Dot Foods I* decision in the 2010 amendments to the direct seller's exemption. Dot's Brief at 38-41. From Dot's perspective, the Legislature intended it to receive the continued benefit of the *Dot Foods I* decision, regardless of whether the Legislature changed the direct seller's exemption after that decision. Dot's Brief at 40. Dot thus asks this Court to interpret the 2010 amendments as providing Dot with special treatment, above and beyond that which any other taxpayer would receive. This Court should reject Dot's interpretation because it completely misstates the Legislature's intent and raises serious constitutional concerns.

The Court's goal when interpreting a statute is to "ascertain and carry out the legislature's intent." *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Absent ambiguity, a court derives the Legislature's intent from the plain meaning of the statute at issue, an inquiry that includes reference to the language of the statute, the context of the entire act, and related statutes. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002). Here, section 1706 of the 2010 amendments plainly limits the law's retroactive effect: "Section 402 of this act does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section." Laws of 2010, 1st Spec. Sess., ch. 23, § 1706. Section 402 is the substantive amendment to the direct seller's exemption. Thus, under section 1706, the 2010 amendments do not apply to final judgments entered prior to the amendments' effective date, May 1, 2010, and no longer subject to appeal. *Id.* at §§ 1706, 1708. Except for this single instance, the amendments are fully retroactive.

The plain language of the 2010 amendments shows that it does not extend the *Dot Foods I* decision beyond that case's specific facts. In *Dot Foods I*, the Supreme Court concluded that Dot qualified for the direct seller's exemption under the former version of RCW 82.04.423 for the January 2000 to April 2006 tax period. 166 Wn.2d at 917-18, 926; CP

359-60, 468-69. The Court issued this decision in September 2009 and denied the Department's motion for reconsideration in February 2010. *Id.*, 166 Wn.2d at 912; CP 22. Thus, the parties agree *Dot Foods I* was a final judgment not subject to appeal that the Court entered prior to the amendment's effective date on May 1, 2010.

The Department does dispute Dot's assertion that the *Dot Foods I* decision for the January 2000 to April 2006 tax period, when combined with section 1706, somehow entitles Dot to be free from the 2010 amendments' retroactive effect for the tax period at issue in this case. *Dot Foods I* only decided Dot's eligibility for the former direct seller's exemption during the January 2000 to April 2006 tax period. CP 359-60, 468-69. In contrast, this case relates to Dot's qualification for the current direct seller's exemption during the May 2006 to December 2007 tax period. CP 12-16. Because Dot did not even bring this refund action until months after the Legislature enacted the 2010 amendment, and the action currently is the subject of this appeal, there is no "final judgment" of Dot's current refund claim under the plain language of section 1706. CP 7. It is, therefore, subject to the amended law.

According to Dot, interpreting section 1706 in this way renders the provision's language superfluous because the Constitution already prohibits the Legislature from passing a statute that reverses a final

judgment from the Court. Dot's Brief at 36. Following Dot's logic, however, would render "superfluous" numerous other tax statutes expressly addressing the constitutional limits of taxation. *See, e.g.,* RCW 82.04.4286 (allowing business and occupation tax deduction for amounts derived from business the state is constitutionally prohibited from taxing); RCW 82.08.0254 (retail sales tax shall not apply to sales the state is constitutionally prohibited from taxing). Drafting section 1706 to ensure compliance with the Constitution hardly qualifies as unnecessary or meaningless language.

Dot's reliance on the legislative history of section 1706 does not change this interpretation. Section 1706's language is unambiguous, and therefore, there is no reason to look beyond the statute's plain language. *See Jametsky*, 179 Wn.2d at 762 (the court does not resort to legislative history or other outside sources when a statute is unambiguous). Even if this Court were to consider the legislative history of the 2010 amendment, it merely reiterates that Dot will receive the benefit of the *Dot Foods I* decision. *See* H.B. Rep. on Engrossed Substitute S.B. 6143, 61st Leg., 1st Spec. Sess., at 16 (Wash. 2010) ("The retroactive change will not impact the taxpayer that prevailed in the Dot Foods decision . . ."). Thus, the legislative history simply confirms the 2010 amendments' express

language that the change in law does not affect any final judgments not subject to appeal – such as *Dot Foods I.*

Dot's reading of this legislative history as providing special treatment for Dot is nothing more than wishful thinking. In fact, interpreting section 1706 as providing Dot with some sort of special exemption raises constitutional concerns. Under Dot's interpretation, the Legislature apparently meant to apply the 2010 amendment retroactively to all other taxpayers, but for unknown reasons allowed Dot the continued benefit of the original statute. Such an interpretation is plainly contrary to the privileges and immunities clause of the Washington Constitution. *See* Const. art. I, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."). And as Dot itself points out, this Court must presume that the Legislature intended to act in compliance with the Constitution. *School Dist.'s Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010); *see* Dot's Brief at 41.

Aside from section 1706, Dot argues that *Dot Foods I* "directly provides" that it is entitled to a refund for the tax periods at issue in this case – tax periods that were not even before the *Dot Foods I* Court. Dot's Brief at 41. Dot's assertions are contrary to basic principles of law. The

Supreme Court has repeatedly stated that a court's decisions must be limited to both the facts and applicable law of the instant case. *See, e.g.*, *Obert v. Environmental Research & Development Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) ("To decide this case upon neither the facts presented nor the applicable law would constitute an advisory opinion."). For Dot to suggest that *Dot Foods I* somehow constitutes a "final judgment" for tax periods not at issue in the case would turn parts of that case into advisory opinion. It is also contrary to the statements in the decision upon which Dot relies. In *Dot Foods I*, the Supreme Court stated "Dot remains qualified for the B&O tax exemption *to the extent its sales continue to qualify for the exemption*." 166 Wn.2d at 926 (emphasis added). When the Legislature retroactively amended RCW 82.04.423, Dot's sales no longer qualified for "the exemption" – and Dot does not contend otherwise. Accordingly, the Supreme Court itself limited the *Dot Foods I* decision to the facts and law in that particular case. *Id.*

Disregarding the basic principle that each case is limited to its own facts and law, Dot insists that its refund action is different. According to Dot, *Dot Foods I* must apply to this case because, unlike an annual income tax, the B&O tax is not connected to any measurement of time. Dot's Brief at 41-44. Therefore, Dot asserts that the later tax periods at issue here do not constitute separate claims for res judicata purposes. The

argument is meritless. B&O taxes "are due monthly within twenty-five days after the end of the month in which the taxable activities occur." RCW 82.32.045(1). Indeed, Washington courts have recognized this and treat time periods outside of the litigation as "separate and independent" from the tax period at issue. *See AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 548, 551, 205 P.3d 159 (2009).

If this Court were to accept Dot's arguments, Dot would continue to receive the benefit of the former direct seller's exemption even though the Legislature changed the law to exclude taxpayers such as Dot from its scope. By suggesting that this Court disregard the existing law and apply the former version of the exemption, Dot invites this Court to violate the separation of powers doctrine, the same violation Dot accuses the Legislature of committing against the Court. *See Hambleton*, 181 Wn.2d at 823 (explaining that each court at every level should decide a case based on laws existing at that time). This Court should avoid adopting interpretations that are inconsistent with the Constitution. *City of Seattle v. Montana*, 129 Wn.2d 583, 590, 919 P.2d 1218 (1996). Because nothing in the 2010 amendment or *Dot Foods I* exempts Dot from the amendment's retroactive effect, and the law might be unconstitutional if it did, the Department is not prevented from litigating whether Dot is entitled to a refund for the 2006-2007 period at issue in this case.

2. The Legislature complied with the separation of powers doctrine when it amended RCW 82.04.423.

Dot argues that if the 2010 amendment to the direct seller's exemption denies Dot the benefits of its judgment in *Dot Foods I*, then the amendment violates the separation of powers doctrine. Dot's Brief at 45. But the 2010 amendment expressly provides that the change to the direct seller's exemption does not affect any final judgments, not subject to appeal, entered by a court prior to the effective date for the change. Laws of 2010, 1st Spec. Sess., ch. 23, § 1706. Because Dot remained entitled to the benefits of *Dot Foods I*, it cannot meet the terms of its own hypothetical and this Court should reject its separation of powers claim.

The separation of powers doctrine ensures that each branch of government stays within its own sphere of authority set out in the Constitution. *Hambleton*, 181 Wn.2d at 817. The Legislature's authority is to create policies, draft laws, and pass those laws. *Id.* at 818. The Court's function is to interpret the laws that the Legislature has passed. *Id.* Thus, the Legislature violates separation of powers when it intrudes upon the Court's role by interfering with a decision the Court has already issued. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 505-06, 509, 198 P.3d 1021 (2009). While the Legislature and the Court must maintain their independent roles, their responsibilities are still "partially

intertwined" to ensure a proper system of checks and balances between the branches. *Hambleton*, 181 Wn.2d at 818.

Recognizing this delicate balance between branches, the Supreme Court has commended the cooperation between the Courts and the Legislature in other decisions with circumstances remarkably similar to this case. *See, e.g.*, *Hambleton*, 181 Wn.2d at 817-23; *Hale*, 165 Wn.2d at 509 (describing Court's interpretation of statute and Legislature's retroactive amendment in response as a model for the two branches working together). In *Hambleton*, the Court rejected a separation of powers argument because "[t]he legislature was careful not to affect the rights of any parties to a prior judgment, reopen a case, or interfere with any judicial function" when it retroactively amended a law that the Supreme Court had interpreted. 181 Wn.2d at 817. Thus, the *Hambleton* case not only requires this Court to reject Dot's due process arguments, but also to reject Dot's separation of powers arguments.

Similar to Dot's claim, the estates in *Hambleton* asserted that the retroactive amendment to the definition of "transfer" in the estate tax statutes violated the separation of powers doctrine. 181 Wn.2d at 813-14, 816. In *Bracken*, the Supreme Court had narrowly interpreted the definition of "transfer" in the estate tax statutes. 175 Wn.2d at 554, 563. While the estates' cases were still pending before various courts, the

Legislature responded to the *Bracken* decision by amending the definition of "transfer" retroactively. *Hambleton*, 181 Wn.2d at 813-14. However, the Legislature drafted the law "'to not affect any final judgment, no longer subject to appeal, entered by a court of competent jurisdiction before the effective date of this section.'" *Id.* at 821-22 (citing Laws of 2013, 2d Spec. Sess., ch. 2, § 10). This is the exact language used by the Legislature when it amended the direct seller's exemption.

Based on this language, the Court in *Hambleton* rejected the estates' separation of powers arguments. *Id.* at 821-23. The Court reasoned that the language ensured that the retroactive amendment would not invade the Court's province by affecting a final judgment. *Id.* at 821-22. Because the *Hambleton* cases were still pending when the amendment became effective, the Court concluded that the Legislature had not violated the separation of powers doctrine. *Id.* at 821-23.

This Court should apply the same reasoning to conclude that no separation of powers violation occurred in this case. Just as the Legislature changed the estate tax statute in reaction to a Supreme Court decision, the Legislature here changed the direct seller's exemption in response to the Supreme Court's decision in *Dot Foods I*. *Compare* Laws of 2013, 2d Spec. Sess., ch. 2, § 1, *with* Laws of 2010, 1st Spec. Sess., ch. 23, § 401. And just as the Legislature did with the estate tax, the

Legislature applied the change to RCW 82.04.423 retroactively using language identical to that upheld in *Hambleton*. In both cases, the Legislature specifically stated that the amendment "does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section." Laws of 2013, 2d Spec. Sess., ch. 2, § 10; Laws of 2010, 1st Spec. Sess., ch. 23, § 1706. And just like the estates' appeals, Dot's present appeal is not a final judgment because it is still being litigated and involves tax periods other than those litigated in *Dot Foods I*. CP 14, 359-60, 468-69. Accordingly, the 2010 amendments in no way invade the Court's sphere of authority.

Although *Hambleton* discusses the exact separation of powers argument Dot makes, Dot fails to even mention the case in its separation of powers arguments. *See* Dot's Brief at 45-48. Instead, Dot again claims that if the 2010 amendments interfere with its ability to rely on the "collateral estoppel effect" of *Dot Foods I*, then the amendment violates separation of powers. Under Dot's theory, since the Supreme Court already interpreted the direct seller's exemption in *Dot Foods I*, the Legislature can never amend the exemption, even prospectively. In other words, Dot's argument means that separation of powers entitles Dot to the benefit of the *Dot Foods I* decision in perpetuity. The Supreme Court, however, has already rejected such arguments. *See, e.g.*, *Lummi Indian*

Nation v. State, 170 Wn.2d 247, 241 P.3d 1220 (2010) (rejecting contention that simply because a court's interpretation relates back to the time the Legislature adopted the statute, any retroactive amendment necessarily violates separation of powers).

Dot also relies upon two recent Supreme Court decisions to claim that the 2010 amendment violates separation of powers by interfering with "'previously litigated adjudicative facts.'" Dot's Brief at 45-48 (referencing *Lummi Indian Nation* and *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015)). Neither case actually supports Dot.

Lummi and *Cornelius* involved challenges to a retroactive amendment that the Legislature made to the municipal water law in response to a Supreme Court decision. *Lummi*, 170 Wn.2d at 250; *Cornelius*, 182 Wn.2d at 588-89. The Supreme Court had held that under the existing water law statutes, new private water rights could not be based merely on capacity and only vested when the water was put to beneficial use. *Lummi*, 170 Wn.2d at 250-51; *Cornelius*, 182 Wn.2d at 587. The Court explained that it was not considering municipal water rights. *Lummi*, 170 Wn.2d at 251; *Cornelius*, 182 Wn.2d at 587.

After the decision, the Legislature amended the water law to broadly define a municipal water supplier and to provide that in certain circumstances, a municipality's water right would not be limited to the

number of service connections being used or state population. *Lummi*, 170 Wn.2d at 256; *Cornelius*, 182 Wn.2d at 588. The Legislature also declared that future water rights require beneficial use, but confirmed that previous water rights issued based upon capacity were still valid. *Lummi*, 170 Wn.2d at 257; *Cornelius*, 182 Wn.2d at 588.

The litigants in *Lummi* and *Cornelius* claimed that this retroactivity provision violated the separation of powers doctrine. In both cases, the Supreme Court disagreed because the Legislature had drafted the amendment with deference to the Court's previous decision. 170 Wn.2d at 263; *see also Cornelius*, 182 Wn.2d at 589-93. In *Lummi*, the Court explained that the litigants raised a facial challenge, and therefore, had not presented any previously adjudicated water rights. 170 Wn.2d at 264-65. Similarly, in *Cornelius*, no court had previously litigated the specific water rights at issue in that case. 182 Wn.2d at 591. Because the Legislature had not interfered with any adjudicated facts, the Court concluded in both cases that the retroactive amendment did not violate separation of powers. *Lummi*, 170 Wn.2d at 265; *Cornelius*, 182 Wn.2d at 593.

Like the retroactive amendment in *Lummi* and *Cornelius*, the 2010 amendment to the direct seller's exemption does not disturb any "previously litigated adjudicative facts." While Dot claims that the amendment interferes with its rights under *Dot Foods I*, the amendment

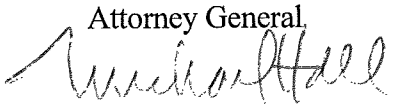
does no such thing. In fact, the Legislature carefully drafted the 2010 amendments to ensure that it did not affect any final judgments. Laws of 2010, 1st Spec. Sess., ch. 23, § 1706. Under the amendments, Dot receives the full benefit of the former direct seller's exemption for the January 2004 to April 2006 tax period that the *Dot Foods I* decision addressed. Until now, however, no court has decided Dot's eligibility for the amended direct seller's exemption during the tax period at issue in this case, May 2006 through December 2007. Accordingly, the 2010 amendment does not violate separation of powers because it does not interfere with any "previously litigated adjudicative facts."

IV. CONCLUSION

The Court should reverse the trial court's grant of summary judgment to Dot, award summary judgment to the Department on all issues, and dismiss this matter.

RESPECTFULLY SUBMITTED this 5th day of August, 2015.

ROBERT W. FERGUSON
Attorney General



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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of August, 2015, at Tumwater, WA.

Carrie A. Parker

Carrie A. Parker, Legal Assistant

APPENDIX A

RCW 82.04.423 (1983)

(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section.

APPENDIX B

the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise; and

(B) Either the person who originated the loans or the person claiming a deduction under this subsection (4) sold the loans on the secondary market or securitized the loans and sold the securities on the secondary market; and

(b) The amounts received for servicing the loans are determined by a percentage of the interest paid by the borrower and are only received if the borrower makes interest payments.

PART IV
Direct Seller Business and Occupation Tax Exemption

NEW SECTION. **Sec. 401.** (1) A business and occupation tax exemption is provided in RCW 82.04.423 for certain out-of-state sellers that sell consumer products exclusively to or through a direct seller's representative. The intent of the legislature in enacting this exemption was to provide a narrow exemption for out-of-state businesses engaged in direct sales of consumer products, typically accomplished through in-home parties or door-to-door selling.

(2) In *Dot Foods, Inc. v. Dep't of Revenue*, Docket No. 81022-2 (September 10, 2009), the Washington supreme court held that the exemption in RCW 82.04.423 applied to a taxpayer: (a) That sold nonconsumer products through its representative in addition to consumer products; and (b) whose consumer products were ultimately sold at retail in permanent retail establishments.

(3) The legislature finds that most out-of-state businesses selling consumer products in this state will either be eligible for the exemption under RCW 82.04.423 or could easily restructure their business operations to qualify for the exemption. As a result, the legislature expects that the broadened interpretation of the direct sellers' exemption will lead to large and devastating revenue losses. This comes at a time when the state's existing budget is facing a two billion six hundred million dollar shortfall, which could grow, while at the same time the demand for state and state-funded services is also growing. Moreover, the legislature further finds that RCW 82.04.423 provides preferential tax treatment for out-of-state businesses over their in-state competitors and now creates a strong incentive for in-state businesses to move their operations outside Washington.

(4) Therefore, the legislature finds that it is necessary to reaffirm the legislature's intent in establishing the direct sellers' exemption and prevent the loss of revenues resulting from the expanded interpretation of the exemption by amending RCW 82.04.423 retroactively to conform the exemption to the original intent of the legislature and by prospectively ending the direct sellers' exemption as of the effective date of this section.

Sec. 402. RCW 82.04.423 and 1983 1st ex.s. c 66 s 5 are each amended to read as follows:

(1) Prior to the effective date of this section, this chapter ((~~shall~~)) does not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

(a) Does not own or lease real property within this state; and

(b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and

(c) Is not a corporation incorporated under the laws of this state; and

(d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys only consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells at retail, or solicits the sale at retail of, only consumer products in the home or otherwise than in a permanent retail establishment; and

(a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section ((~~shall~~)) may be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to ((~~the enactment of this section~~)) August 23, 1983.

PART V
Business and Occupation Tax Preferences for Manufacturers of Products Derived from Certain Agricultural Products

NEW SECTION. **Sec. 501.** (1)(a) In 1967, the legislature amended RCW 82.04.260 in chapter 149, Laws of 1967 ex. sess. to authorize a preferential business and occupation tax rate for slaughtering, breaking, and/or processing perishable meat products and/or selling the same at wholesale. The legislature finds that RCW 82.04.260(4) was interpreted by the state supreme court on January 13, 2005, in *Agrilink Foods, Inc. v. Department of Revenue*, 153 Wn.2d 392 (2005). The supreme court held that the preferential business and occupation tax rate on the slaughtering, breaking, and/or processing of perishable meat products applied to the processing of perishable meat products into nonperishable finished products, such as canned food.

(b) The legislature intends to narrow the exemption provided for slaughtering, breaking, and/or processing perishable meat products and/or selling such products at wholesale by requiring that the end product be a perishable meat product; a nonperishable meat product that is comprised primarily of animal carcass by weight or volume, other than a canned meat product; or a meat by-product.

(2)(a) A business and occupation tax exemption is provided for (i) manufacturing by canning, preserving, freezing, processing, or dehydrating fresh fruits or vegetables, and (ii) selling such products at wholesale by the manufacturer to purchasers who transport the goods out of state in the ordinary course of business. This exemption expires July 1, 2012, and is replaced by a preferential business and occupation tax rate.

(b) The legislature finds that the rationale of the *Agrilink* decision, if applied to these tax preferences, could result in preferential tax treatment for any

taxes under this subsection with respect to property and services for which the person is required to repay taxes under RCW 82.08.—(section 2, chapter 1 (ESSB 6789), Laws of 2010 1st sp. sess.).

(4) The definitions and requirements in RCW 82.08.— (section 2, chapter 1 (ESSB 6789), Laws of 2010 1st sp. sess.) apply to this section.

(5) This section expires April 1, 2018.

PART XVII
Miscellaneous Provisions

NEW SECTION. **Sec. 1701.** If a court of competent jurisdiction, in a final judgment not subject to appeal, adjudges any provision of section 104(1)(c) of this act unconstitutional or otherwise invalid, Part I of this act is null and void in its entirety.

NEW SECTION. **Sec. 1702.** Part I of this act applies with respect to gross income of the business, as defined in RCW 82.04.080, including gross income from royalties as defined in RCW 82.04.2907, generated on and after June 1, 2010. For purposes of calculating the thresholds in section 104(1)(c) of this act for the 2010 tax year, property, payroll, and receipts are based on the entire 2010 tax year.

NEW SECTION. **Sec. 1703.** Except as provided in section 202 of this act, section 201 of this act applies to tax periods beginning January 1, 2006.

NEW SECTION. **Sec. 1704.** Sections 402 and 702 of this act apply both retroactively and prospectively.

NEW SECTION. **Sec. 1705.** In accordance with Article VIII, section 5 of the state Constitution, sections 702 and 1704 of this act do not authorize refunds of business and occupation tax validly collected before July 1, 2010, on amounts received by an individual from a corporation as compensation for serving as a member of that corporation's board of directors.

NEW SECTION. **Sec. 1706.** Section 402 of this act does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section.

NEW SECTION. **Sec. 1707.** Except as provided in section 1701 of this act, if any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 1708.** Except as otherwise provided in this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect May 1, 2010.

NEW SECTION. **Sec. 1709.** Parts III and XIII and sections 101 through 106, 108 through 112, 501 through 503, 505, 507, 510 through 514, 516 through 519, 901, 903 through 911, and 1201 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect June 1, 2010.

NEW SECTION. **Sec. 1710.** Sections 106, 901, and 1201 of this act expire July 1, 2010.

NEW SECTION. **Sec. 1711.** Sections 503, 505, and 514 of this act expire June 10, 2010.

NEW SECTION. **Sec. 1712.** Sections 504, 506, and 515 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect June 10, 2010.

NEW SECTION. **Sec. 1713.** Parts VI, VII, and XIV and sections 107, 702, 902, and 1202 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect July 1, 2010.

NEW SECTION. **Sec. 1714.** Section 507 of this act expires July 13, 2010.

NEW SECTION. **Sec. 1715.** Section 508 of this act takes effect July 13, 2010.

NEW SECTION. **Sec. 1716.** Section 508 of this act expires July 1, 2011.

NEW SECTION. **Sec. 1717.** Section 509 of this act takes effect July 1, 2011.

NEW SECTION. **Sec. 1718.** Section 1001 of this act applies prospectively only.

NEW SECTION. **Sec. 1719.** Sections 1502 and 1503 of this act apply to claims for credit or refund filed with the department of revenue after June 30, 2010.

Passed by the Senate April 12, 2010.
Passed by the House April 10, 2010.
Approved by the Governor April 23, 2010.
Filed in Office of Secretary of State April 23, 2010.

CHAPTER 24

[Engrossed Second Substitute House Bill 2630]
OPPORTUNITY EXPRESS PROGRAM

AN ACT Relating to creating the opportunity express program; amending RCW 28C.04.390 and 28C.18.164; adding new sections to chapter 28B.50 RCW; creating a new section; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** (1) The legislature finds that in times of severe economic recession, the state has a special obligation to help unemployed and low-income citizens access the training and education necessary to help them find and keep living wage jobs. The legislature also finds that during times of recession, when state revenues are at their lowest, demand for education and training are at their highest, making it especially important for the legislature to set clear goals and make the most efficient use of limited state resources.

(2) The legislature therefore intends to expand training and education programs, which have proven to be successful, to help Washington citizens receive the training they need. These programs include the worker retraining program, the opportunity grant program, and the opportunity internship program. The legislature further intends to create more effective intake and

WASHINGTON STATE ATTORNEY GENERAL

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Transmittal Letter

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